

United States Senate

SENATE IMPEACHMENT TRIAL COMMITTEE

WASHINGTON, DC 20510-6326

DISPOSITION OF JUDGE G. THOMAS PORTEOUS, JR.'S **MOTION FOR A CONTINUANCE**

On June 11, 2010, Judge G. Thomas Porteous filed a Motion for a Continuance requesting modification of the Committee's Scheduling Order of May 26, 2010. On June 14, 2010, the House of Representatives filed its Opposition, and Judge Porteous filed an Expedited Motion for a Hearing on His Pending Motion for a Continuance. For the reasons stated below, the Committee grants in part and denies in part Judge Porteous's Motion for a Continuance. The Expedited Motion for a Hearing is denied.

BACKGROUND

Judge Porteous seeks a continuance of all pending deadlines under the May 26 Scheduling Order based on his retention of new counsel on Articles II and IV of the Articles of Impeachment. Last week, Judge Porteous removed lead counsel Richard Westling and his firm Ober, Kaler, Grimes & Shriver, P.C. from his defense team on Articles II and IV; in their place, Judge Porteous appointed Jonathan Turley, who was initially retained in mid-May, as co-lead counsel and also brought on Daniel Schwartz, P.J. Meitl, and Daniel O'Connor from Bryan Cave LLP. According to the Motion, this change in representation was made after Mr. Turley completed an independent conflicts review of Mr. Westling's representation of Judge Porteous in this matter and his previous and ongoing representation of Louis and Lori Marcotte, who will likely be key impeachment trial witnesses against Judge Porteous. Specifically, Mr. Westling previously represented Louis Marcotte in the federal criminal investigation on judicial corruption and bribery in the 24th Judicial District Court of Louisiana¹ and currently represents Louis and Lori Marcotte and Bail Bonds Unlimited, Inc., in another related civil proceeding.

The House strenuously objects to a continuance of the evidentiary hearings and maintains that Judge Porteous is "once again 'gaming' the system in order to delay and derail the proceedings as much as possible."² The House first raised the potential conflict of interest to Judge Porteous and his defense team (including Mr. Westling) on October 29, 2009. Judge Porteous, the House claims, has declined to replace Mr. Westling on numerous occasions in the House impeachment proceedings and again at the commencement of impeachment trial proceedings before the Senate.

¹ See H.R. Rep. No. 111-427, Ex. 71 (March 4, 2010).

² House of Representative's Opposition to Judge G. Thomas Porteous, Jr.'s Motion for Continuance at 2-4 (June 14, 2010).

Counsel for the House and Judge Porteous, Senate Legal Counsel, and the Committee staff discussed this conflict at a meeting on May 18, 2010. At this meeting, Mr. Westling assured the Committee staff that the conflicts issue had been explored and resolved to his satisfaction, in part, by retaining Mr. Turley to handle the Article II allegations relating to the Marcottes. He also assured all present (including Mr. Turley) that Judge Porteous could work with the proposed deadlines and the Committee's hearing dates.

On June 8, 2010, Judge Porteous missed a filing deadline under the Scheduling Order. After an inquiry regarding the missed deadline by the Committee staff, Mr. Turley provided a letter on June 9, 2010, indicating that he joined the defense team "in part to review this alleged conflict of interest raised by House and Senate counsel" and that after completing this review he now believed "it is necessary for Mr. Westling to remove himself from representing Judge Porteous in relation to Article II and Marcotte-related issues to avoid even the appearance of a conflict of interest in this case."³ The letter then stated that "[a] continuance is necessary to address current matters on the schedule." This was the first notice given to the Committee of Mr. Turley's conflicts review and the resulting change in representation.

At a June 10, 2010, meeting with the Committee staff, Mr. Turley reiterated Judge Porteous's request for a continuance and was advised to file promptly a motion for modification of the Scheduling Order. In addition, the Committee requested that Judge Porteous file a memorandum addressing the conflicts review and analysis under the appropriate rules of professional responsibility. In response, Judge Porteous filed the pending Motion for a Continuance on June 11, 2010, and Mr. Turley submitted a letter on June 13, 2010, outlining his conflicts analysis.⁴

Counsel for Judge Porteous proposes a bifurcation of representation on the Articles of Impeachment whereby the full team including Mr. Westling would defend against Articles I and III but only Mr. Turley, Mr. Schwartz, Mr. Meitl, and Mr. O'Connor will defend against Articles II and IV. With the start of the Committee's evidentiary hearings still six weeks away, Judge Porteous seeks an eight-week continuance of the hearings.

³ Letter of Jonathan Turley to the Honorable Claire McCaskill and the Honorable Orrin G. Hatch at 2 (June 9, 2010). Both the Motion and the Mr. Turley's letter mistakenly assert that the House objects to this alleged conflict of interest. This is incorrect. The House has consistently stated that even as it raises the potential conflict for the record, it does not seek the disqualification of Mr. Westling from any part of the case.

⁴ Letter of Jonathan Turley to the Honorable Claire McCaskill and the Honorable Orrin G. Hatch (June 13, 2010) ("June 13 Turley Letter").

STANDARD

Impeachment has a unique role in our constitutional order.⁵ The Supreme Court has recognized that “the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge,” and that the impeachment proceeding is independent of, and not akin to, a civil or criminal proceeding.⁶ The Founders’ deliberate act of endowing the House and Senate with the impeachment power leads to a distinctive process that is neither subject to judicial review nor constrained by the procedures of the judicial branch.

Under Rule XI, the Committee is called on “to receive evidence and take testimony . . . [and to] report to the Senate in writing a certified copy of the transcript of the proceedings and the testimony had and given before such committee.”⁷ The Senate has also authorized the Committee “to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.”⁸ With these guidelines and subject to review by the full Senate, the Committee has broad discretion to manage the evidentiary proceedings and prepare a record for deliberation by the full Senate.⁹ The Senate’s delegation of responsibility to this Committee comes with the inherent power to supervise—and, if necessary, disqualify—counsel appearing before it.

DISCUSSION

The Committee must first confront a conflict-of-interest issue that Judge Porteous and his counsel have either willfully ignored or unreasonably excused since Mr. Westling was first retained. Even viewing the facts in the light most favorable to Judge Porteous and Mr. Westling, the October 29 letter from the House alerted them of this serious issue. Indeed, Mr. Westling sought informed consent waivers from the Marcottes in an attempt to salvage his representation of Judge Porteous. Yet even after being denied such waivers, Mr. Westling did not withdraw but instead opted only to bring in other counsel to cross-examine the Marcottes.¹⁰ This failure to withdraw is professionally and ethically inexcusable. As explained below, neither Mr. Westling’s partial withdrawal nor Mr. Turley’s proposal to screen Mr. Westling from Article II and IV resolve the conflict of interest under the applicable rules of professional responsibility.

⁵ See U.S. Const. art. I, §§ 2, 3.

⁶ *Nixon v. United States*, 506 U.S. 224, 236 (1993) (rejecting judicial review of the Senate’s impeachment procedures based on the Constitution’s commitment of “the sole Power to try all Impeachments” to the Senate); *id.* at 234 (citing U.S. Const., art. I, § 3, cl. 7).

⁷ Rule XI, Procedure and Guidelines for Impeachment Trials in the United States Senate (August 15, 1986).

⁸ S. Res. 111-458 § 5 (March 17, 2010).

⁹ Under Rule XI, the full Senate retains oversight over all actions taken by the Committee; therefore, Judge Porteous will have the opportunity to seek relief from the full Senate.

¹⁰ Even after Mr. Westling’s co-counsel did not appear at a December 2009 hearing where the Marcottes testified before the House Impeachment Task Force, he waited to address the conflict until May 2010.

I. Conflict of Interest

Prompted by new information disclosed in the June 9 letter from Mr. Turley, the Committee staff sought more information at the June 10 meeting regarding the conflict of interest in Mr. Westling's representation of Judge Porteous, the conflicts review conducted by Mr. Turley, and how the proposed bifurcated representation addressed the actual conflict identified. Although the parties were aware of this issue in October 2009, the material facts underlying the conflict were not fully disclosed to the Committee until the June 10 meeting. Since mid-May, Judge Porteous and his attorneys have put forth three different arrangements to address Mr. Westling's conflict.¹¹ None of the proposals offered by Mr. Westling and Mr. Turley adequately address the glaring conflict of interest.¹²

A. Mr. Westling has a conflict of interest in representing Judge Porteous.

There is no doubt that Mr. Westling has a conflict of interest under both the District of Columbia Rules of Professional Conduct and the American Bar Association Model Rules of Professional Conduct.¹³ Unless informed consent of each affected client is secured, D.C. Rule 1.7(b) states that "a lawyer shall not represent a client with respect to a matter if: (1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer."¹⁴ Mr. Westling has a Rule 1.7(b)(1) conflict here as Judge Porteous's position is adverse to a position to be taken by the Marcottes, another current client of Mr. Westling, in this proceeding.

Mr. Westling argues that Rule 1.7(d) allows him to continue representing Judge Porteous despite his Rule 1.7(b)(1) conflict. Subpart (d), often referred to as the "thrust-upon" exception, states: "If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4)."¹⁵ At the June 10 meeting, Mr. Westling suggested that this

¹¹ At the May 18 meeting, Mr. Westling reiterated his longstanding position that his conflict was sufficiently addressed if he did not cross-examine the Marcottes. In the face of Senate Legal Counsel's skepticism regarding this arrangement, Mr. Westling apparently requested a separate conflicts analysis by Mr. Turley. In his June 8 letter, Mr. Turley represented that Mr. Westling's conflict could be mitigated if he was screened from Article II, which alleges corrupt conduct involving the Marcottes. When asked by Senate Legal Counsel at the June 10 meeting why Mr. Westling should not also be screened from Article IV, which incorporates Marcotte-related allegations, Mr. Turley conceded that Mr. Westling should be screened from both Article II and IV.

¹² Indeed, Mr. Turley's June 13 letter raises concerns about some of the earlier proposals for addressing the conflict. See June 13 Turley Letter at 11.

¹³ The applicable provisions under the D.C. Rules and the Model Rules are substantially similar; therefore, the analysis under both yields the same conclusion. See D.C. Rules of Prof'l Conduct R. 1.7 (2006); Model Rules of Prof'l Conduct R. 1.7 (2009). As Mr. Westling is a member of the D.C. Bar and Mr. Turley's analysis relied on the D.C. Rules, the Committee opts to examine this issue under the D.C. Rules.

¹⁴ D.C. Rules of Prof'l Conduct R. 1.7(b)(1); see also *id.*, R. 1.7(c).

¹⁵ *Id.*, R. 1.7(d).

exception applied here because he had a reasonable basis for concluding at the time Judge Porteous retained him that the Marcotte-related allegations would not be part of the impeachment inquiry since those allegations were not part of the Judicial Council's investigation and report.

Mr. Westling's reliance on subpart (d) is not credible and undermined by his long involvement in representing Mr. Marcotte in a related criminal matter. According to Mr. Turley's June 13 letter, Mr. Westling represented Mr. Marcotte from at least 2004 through 2006 in the Justice Department investigation that led to a guilty plea for Mr. Marcotte and, later, the referral of Judge Porteous to the Judicial Council of the Fifth Circuit: "As part of the plea agreement, Louis Marcotte agreed to cooperate with the government, which continued until 2006. As part of this cooperation, Mr. Westling participated in various meetings with the government, including but not limited to a meeting with the Justice Department's Public Integrity Section which was investigating Judge Porteous."¹⁶ Thus, he was well aware that the relationship between Judge Porteous and the Marcottes was being investigated years before he was retained by Judge Porteous in 2008. The accusations of corrupt conduct by Judge Porteous and the Marcottes were also included in the Justice Department referral letter to the Judicial Council dated May 18, 2007. While Judge Porteous (and Mr. Westling) may have been hopeful that those allegations would not be included in the Articles of Impeachment, the inclusion of those allegations was reasonably foreseeable.

In addition, as Mr. Turley noted in the June 13 letter, there are strong arguments that Mr. Westling also has a conflict under Rule 1.7(b)(2) and (b)(3).¹⁷ These provisions bar representation where: "(2) Such representation will be or is likely to be adversely affected by representation of another client; [or] (3) Representation of another client will be or is likely to be adversely affected by such representation."¹⁸ As Article II centers on Marcotte-related conduct and Article IV also references the Marcottes, the ongoing duties of loyalty and confidentiality to the Marcottes will unavoidably impair Mr. Westling's representation and defense of Judge Porteous. Similarly, his representation of Judge Porteous here will complicate his defense of the Marcottes in the civil matter now pending in federal court and potentially interfere with their role as witnesses in this proceeding.

The Committee therefore finds that Mr. Westling has a conflict of interest under Rule 1.7(b)(1), (b)(2), and (b)(3).

B. The proposed solution of screening Mr. Westling from Articles II and IV does not cure the conflict.

As outlined by Mr. Turley in his June 9 letter, at the June 10 meeting, and in the June 13 conflicts letter, Judge Porteous proposes to address the conflict by creating a firewall screening

¹⁶ June 13 Turley Letter at 1.

¹⁷ *Id.* at 8.

¹⁸ The "thrust upon" exception under subpart (d) expressly excludes (b)(2) and (b)(3) conflicts. *See id.*, R. 1.7(d).

Mr. Westling and his firm from the defense against Articles II and IV.¹⁹ Despite settling on and recommending this arrangement, Mr. Turley raised for the first time in his June 13 letter that he “believe[s] a compelling argument can be made, with sufficient time to prepare for new counsel, that there is no alternative to complete withdrawal.”²⁰

The Committee is deeply troubled that this obvious conflict, which Judge Porteous and Mr. Westling have known about since October 2009, was not promptly and squarely resolved. When viewed in light of the abrupt changes in representation and delays in the proceedings before the Judicial Council, there is considerable doubt whether Judge Porteous has made a good faith effort to resolve this conflict. The wavering and evolving analysis and proposed remedies offered by counsel has complicated and frustrated the prompt resolution of this issue.

Even the final solution recommended by Judge Porteous to limit Mr. Westling to his defense against Articles I and III is problematic. Mr. Turley assumes but does not cite any supporting authority resolving this type of conflict with a screen or firewall.²¹ Just as a civil or criminal case with multiple claims or counts is still one “matter” under the rules of professional conduct, the Senate’s trial of the four Articles of Impeachment is also a single matter. While a “firewall” to exclude an attorney from discussing matters that present a conflict may be a permissible solution for conflicts imputed to other attorneys in a law firm, a screen cannot resolve the conflict caused by one attorney’s representation of two adverse clients.

C. Absent informed consent of the Marcottes and Judge Porteous, Mr. Westling must be disqualified as counsel in this matter.

Although no party moves for the disqualification of Mr. Westling, the Committee cannot ignore a conflict of interest that threatens the integrity of the proceedings on Articles II and IV. The sole remedy for resolving this conflict without the disqualification of Mr. Westling is for Judge Porteous and the Marcottes to “provide[] informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation.”²² The Marcottes—key witnesses on Articles II and IV—have refused to give informed consent to Mr. Westling.²³ Therefore, the Committee has no choice but to disqualify Mr. Westling as counsel in this matter.

II. The Committee’s Schedule

More than six weeks remain until the evidentiary hearings under the current Scheduling Order. Because of Mr. Westling’s failure to address this conflict, the Committee is forced to modify the current schedule to allow Judge Porteous’s remaining counsel more time to prepare

¹⁹ See June 13 Turley Letter at 9-13.

²⁰ *Id.* at 11.

²¹ See *id.*

²² D.C. Rules of Prof’l Conduct R. 1.7(c).

²³ June 13 Turley Letter at 2.

for the evidentiary hearings. The Judicial Council for the Fifth Circuit addressed these underlying matters in 2007. The House impeachment proceeding in this matter began in September 2008 and resulted in Articles of Impeachment adopted on March 17, 2010.²⁴ Based on Judge Porteous's participation in these earlier proceedings, a continuance of the evidentiary hearings of two months (or longer) is not warranted.²⁵

The evidentiary hearings before the Committee are hereby continued to September 13, 2010. This resolution is appropriate given that Judge Porteous has been fully aware of this issue for almost eight months. The House's discovery production is now complete.²⁶ This provides remaining counsel twelve full weeks to prepare for the evidentiary hearings. Counsel for Judge Porteous and the House are advised that no further continuances based on this issue shall be granted. The Committee's May 26 Scheduling Order is modified as follows:

All Pre-Trial Motions Due	July 21, 2010
Response to Pre-Trial Motions Due	July 28, 2010
Witness Immunity Requests Due	August 2, 2010
Witness Subpoena Requests Due	August 2, 2010
Committee to Hold Hearing on Motions	August 4, 2010
Witness Lists and Proposed Stipulations Due	August 5, 2010
Responses/Objections to Proposed Stipulations Due	August 12, 2010
Reply to Objections to Proposed Stipulations Due	August 19, 2010
Meeting of All Counsel Re: Stipulations & Objections, Exhibits, Witnesses	August 26, 2010
Pre-Trial Statements Due	September 1, 2010
Committee to Hold Evidentiary Hearings	September 13-17, 2010
All Post-Trial Briefs Due	September 24, 2010

²⁴ H. Res. 111-1031 (March 17, 2010). Judge Porteous and his counsel have had the benefit of the House Judiciary Committee's report (published in March 2010) summarizing the evidence in support of the Articles.

²⁵ Judge Porteous cites the length of the impeachment trial proceedings against Judge Alcee Hastings as a reference for the reasonableness of his request for continuance. Judge Hastings's impeachment is the far outlier in terms of length duration for Senate impeachment proceedings. Of the eleven federal judges impeached and tried in the Senate, the duration of Senate impeachment proceedings has varied from 34 to 437 days. Congressional Research Service, *The Role of the Senate in Judicial Impeachment Proceedings* (April 9, 2010) (calculating for each impeachment proceeding the duration between the day the Senate first formed itself as a Court of Impeachment and the Senate's final vote on the articles). All but two impeachments trials were *resolved* within six months. *Id.*

²⁶ Letter of Alan Baron to Richard Westling and Jonathan Turley (June 15, 2010).

Unless otherwise ordered, all filing deadlines shall be submitted in MS Word and PDF formats via electronic mail to filings@site.senate.gov no later than 5:00 p.m. on the due date. Two (2) copies should also be submitted in paper form with the Clerk of the Committee (or her designee) in B-34A of the Russell Senate Office Building soon thereafter. Unless expressly modified, all other requirements of the Committee's May 26 Scheduling Order remain in effect.

CONCLUSION

For these foregoing reasons, the Committee disqualifies Mr. Westling as counsel of record and grants in part and denies in part Judge Porteous's Motion for a Continuance. Judge Porteous's Motion for Hearing is denied.

Dated: June 21, 2010



CLAIRE McCASKILL
Chairman



ORRIN G. HATCH
Vice Chairman



AMY KLOBUCHAR



JIM DeMINT



SHELDON WHITEHOUSE



JOHN BARRASSO



TOM UDALL



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